In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 870

MARY E. SEEBACH, PETITIONER

v.

JOSEPH M. CULLEN, DISTRICT DIRECTOR OF INTERNAL REVENUE, SAN FRANCISCO, CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 29–35) is reported at 224 F. Supp. 15. The opinion of the court of appeals (R. 47–49; Pet. App. 11–13) is reported at 338 F. 2d 663.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1964 (R. 50). The petition for a writ of certiorari was filed on February 2, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

769-174—65

QUESTIONS PRESENTED

1. Whether the Performance Rating Act of 1950, 5 U.S.C. 2002–2005, precludes removal of a federal government employee for improper conduct, when the employee's performance rating for the relevant period was "satisfactory."

2. Whether petitioner's removal from federal government employment was in accord with the requirements of the Lloyd-LaFollette Act, 5 U.S.C. 652(a).

STATUTES INVOLVED

Section 6 of the Performance Rating Act of 1950, 64 Stat. 1099, 5 U.S.C. 2005, provides in relevant part:

> Each performance-rating plan shall provide for ratings representing at least * * * (2) unsatisfactory performance, which shall serve as a basis for removal from the position in which such unsatisfactory performance was rendered; * * *. No officer or employee shall be rated unsatisfactory without a ninety-day prior warning and a reasonable opportunity to demonstrate satisfactory performance.

The Lloyd-LaFollette Act, 37 Stat. 555, 5 U.S.C. 652(a), provides in relevant part:

> *Removal without pay from classified Civil Service—Only for cause; notice; copy of charges; time to answer; examination; record; persons exempt.*
>
> (a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any

person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. * * *

STATEMENT

Petitioner, formerly an employee of the Internal Revenue Service in its San Francisco office, was on February 19, 1962, given official notice by the respondent Cullen, the District Director of Internal Revenue, that the Service proposed to remove her from government employment (R. 9–24). The two charges constituting the basis for the proposed removal were inefficiency and emotional instability (R. 9); and the notification went on to describe twenty-four particular examples and incidents illustrating petitioner's alleged inefficiency and emotional instability (R. 10–23). The same letter informed

petitioner that she had the right to reply both orally and in writing to the charges, that she was entitled to submit affidavits or evidence in support of her answer, and that a final decision would be made after considering her replies (R. 23). Following petitioner's written replies and an oral hearing (R. 90–128), the Internal Revenue Service, on May 8, 1962, formally notified her that the two charges had been sustained, that they warranted her discharge, and that, effective May 11, 1962, she was removed as an employee of the Service (R. 87–89).

The petitioner appealed the discharge to the Civil Service Commission, arguing that her satisfactory performance ratings pursuant to the Performance Rating Act of 1950, 5 U.S.C. 2002–2005, precluded the agency from discharging her; that the charges against her were not sufficiently specific to satisfy the standards announced by statute and regulations; and that the Notice of Removal failed to make determinations as to the accuracy of each charge (R. 81–85). On June 19, 1962, the Regional Office of the Civil Service Commission rejected petitioner's arguments, ruled that the removal was consistent with applicable statutes and regulations, and upheld the agency's action (R. 76–78). Petitioner further appealed to the Civil Service Commission's Board of Appeals and Review (R. 72–75), which, on December 13, 1962, affirmed the decision of the Regional Office (R. 69–70).

Thereafter, petitioner instituted the present action for judicial review of the administrative determinations by the District Director of Internal Revenue and the Civil Service Commission, seeking both rein-

statement and a declaratory judgment fixing her rights as an employee of the United States (R. 1–8). The district court, after reviewing the administrative record, ruled that the respondents' determinations were in accordance with applicable statutes and regulations, and awarded summary judgment for the respondents (R. 29–36). The court of appeals affirmed (Pet. App. 11–13).

ARGUMENT

It is well settled that matters relating to the discharge of federal government employees are within the discretion of the employing agencies, and that judicial review of such matters is limited to the determination of whether the dismissal was effected in compliance with applicable statutory and procedural requirements. *Keim* v. *United States*, 177 U.S. 290; *Eberlein* v. *United States*, 257 U.S. 82; *Hargett* v. *Summerfield*, 243 F. 2d 29 (C.A.D.C.), certiorari denied, 353 U.S. 970. The determination by both courts below that petitioner's removal was in accord with applicable statutory and procedural requirements is plainly correct and, contrary to petitioner's assertions, involves no conflict with other decisions. Further review by this Court is not warranted.

1. Petitioner's principal contention here, as it has been throughout, is that the Performance Rating Act of 1950, 5 U.S.C. 2002–2005, precluded her removal from governmental service. It is argued that when an employee has received a satisfactory performance rating for a particular period, such employee may not be dismissed under the Lloyd-LaFollette Act, 5

U.S.C. 652(a), for inefficiency and emotional instability occurring during that same period.[1] However, this very argument has been repeatedly and uniformly rejected. See, *e.g.*, *Jones* v. *Hobby*, 223 F. 2d 345, 346 (C.A.D.C.); *Thomas* v. *Ward*, 225 F. 2d 953 (C.A.D.C.), certiorari denied, 350 U.S. 958; *McGinty* v. *Brownell*, 249 F. 2d 124, 126 (C.A.D.C.), certiorari denied, 356 U.S. 952; *De fino* v. *McNamara*, 287 F. 2d 339 (C.A.D.C.), certiorari denied, 366 U.S. 976; *DeBusk* v. *United States*, 132 Ct. Cl. 790, certiorari denied, 350 U.S. 988; *Misuraca* v. *United States*, 135 Ct. Cl. 387; *Hoppe* v. *United States*, 136 Ct. Cl. 559, certiorari denied, 355 U.S. 816.

Those rulings are plainly correct. The performance Rating Act of 1950 in no way affects removals pursuant to the Lloyd-LaFollette Act. Nothing in the language of the Rating Act purports to limit discharges for cause under the Lloyd-LaFollette Act. Moreover, the history of performance ratings in the federal government (a history with which Congress was thoroughly familiar, as is evident from the relevant committee reports)[2] and the legislative history of the Performance Rating Act, show that Congress had no such intention.

Neither performance ratings, nor personnel actions based thereon, were innovations of the Performance Rating Act. Indeed, the first Congressional action in this area immediately preceded the Lloyd-LaFollette

[1] As petitioner was in the Classified Civil Service, but was not a veteran, her removal was governed by the Lloyd-LaFollette Act.

[2] See S. Rep. 2265, 81st Cong., 2d Sess., pp. 5–8; H. Rep. 2162, 81st Cong., 2d Sess., pp. 13–16.

Act. By Section 4 of the Act of August 23, 1912, 37 Stat. 413, the Civil Service Commission was directed to establish a system of efficiency ratings for the classified service within the District of Columbia. The Act declared that the system was to provide minimum ratings of efficiency for the purposes of promotion, demotion and *dismissal for inefficiency*. In 1923,[3] and again in 1949,[4] Congress provided for performance ratings for federal employees which were to be used for purposes of salary advancements, reductions in pay, and *dismissal* from the service. While each of these statutes, in common with the Performance Rating Act of 1950, thus provided that an unsatisfactory efficiency rating was to serve as *a* basis for removal, none of them restricted the power of removal under the Lloyd-LaFollette Act for inefficiency or otherwise unsatisfactory service. The discussion on the floor of the Senate in connection with the Classification Act of 1923 clearly indicates that no such restriction was intended. Asked specifically whether it would have an effect upon the dismissal provisions of the Lloyd-LaFollette Act, Senator Sterling, the author of the Committee report on the bill,[5] responded in the negative (64 Cong. Rec. 5110).

The legislative hearings similarly show that there was no purpose to alter the requirements of the Lloyd-LaFollette Act or the procedures traditionally fol-

[3] Section 9 of the Classification Act of 1923, 42 Stat. 1490–1491.

[4] Title IX of the Classification Act of October 28, 1949, 63 Stat. 970.

[5] S. Rep. 486, 67th Cong., 2d Sess.

lowed under that statute. Chairman Mitchell of the Civil Service Commission indicated that, while both the presentation of charges and the granting of an "unsatisfactory" rating were available as means of dismissing an inefficient employee, the former was the appropriate method.[6] This view was concurred in by Commissioner Perkins, who elaborated upon the administrative difficulties attaching to the use of an "unsatisfactory" rating as the basis for dismissal.[7] Additionally, the President of the National Federation of Federal Employees, in objecting to what he deemed the "improper" use of efficiency rating systems to remove employees, stated[8] his understanding that "there is a means provided, and has been in existence since the [Lloyd-LaFollette Act], whereby inefficiency or incompetency can be made the subject of the preferment of charges and the employee be required to answer those charges, to show cause why

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[6] See Hearings before the House Committee on Post Office and Civil Service, 81st Cong., 2d Sess., on H.R. 7264 (A Bill to Authorize the Establishment of Methods for the Evaluation of the Performance of Work of Federal Employees, and For Other Purposes), and on H.R. 7824 (A Bill to Provide for the Administration of Performance-Rating Plans for Certain Officers and Employees of the Federal Government, and For Other Purposes), p. 4.

[7] *Id.*, pp. 9, 68-89. As Commissioner Perkins noted, past experience revealed that removal action based upon the employee's efficiency rating, rather than upon the preferment of charges, frequently resulted in appreciable delays in the separation of inefficient personnel.

[8] *Id.*, p. 34.

he or she should not be demoted or dismissed because of lack of competency or lack of efficiency."[9]

2. Petitioner's remaining assertions of error in connection with her removal are without merit. Relying upon several State court decisions dealing with the removal of State governmental employees, petitioner maintains that the respondent District Director of Internal Revenue could not both file the charges against her and adjudicate the correctness of those charges. However, nothing in the Lloyd-LaFollette Act prevents this procedure. On the contrary, the terms of the statute appear to contemplate that the same officer shall notify the employee of the charges and shall render a decision on the employee's answer to the charges.[10]

The Lloyd-LaFollette Act requires that an employee shall only be removed for "reasons given in writing"

[9] Finally, even if there were some merit to petitioner's argument that a government employee should not be discharged for inefficiency and emotional instability occurring during a period for which the employee was given satisfactory performance ratings, such argument would be of doubtful applicability to the instant case. Petitioner received her last satisfactory performance rating on September 30, 1959 (R. 108, 260). However, as the court of appeals noted (Pet. App. 13), a majority of the incidents, cases, examples of conduct, etc., upon which the charges of inefficiency and emotional instability were based, occurred after September 30, 1959 (R. 12-24). They occurred during a period for which the petitioner was not given a satisfactory rating under the Performance Rating Act.

[10] Section 5 of the Administrative Procedure Act, 5 U.S.C. 1004, which provides for a division of the investigative and prosecutive functions on the one hand and decision making on the other, specifically exempts adjudications involving "the selection or tenure of an officer or employee of the United States" (Section 5(2)).

and that a "decision" be rendered upon the employee's answer to any charges. Applying these requirements, the United States Court of Appeals for the District of Columbia Circuit, in *Mulligan* v. *Andrews*, 211 F. 2d 28, 30, held that the Notice of Removal should "disclose which of the charges contained in the notice of proposed adverse action were relied upon for removal; or, indeed, whether removal rested upon any of the charges." Petitioner complains that the District Director failed to make specific findings with respect to the charges here; and that the court of appeals, by upholding the administrative action, has rendered a decision in conflict with the *Mulligan* case. However, the District Director fully complied with the admonition in *Mulligan*. The letter to petitioner dated February 19, 1962, informing her that the Internal Revenue Service proposed to discharge her, stated (R. 9): "Specifically, your proposed removal is based on the charges of Inefficiency and Emotional Instability." The letter went on to list twenty-four examples and cases of inefficiency and emotional instability, specific incidents of inappropriate conduct and improper handling of cases (R. 10–23). After petitioner's written replies to this letter and an oral hearing, the Internal Revenue Service sent her on May 8, 1962, a Notice of Removal, consisting of a letter and a Notification of Personnel Action form (R. 87–89). The letter specifically informed her: "After careful consideration of the two charges, Emotional Instability and Inefficiency, and your replies thereto, it has been decided that both charges, which are supported by substantive evidence, are sustained and warrant

your removal" (R. 87). The Notification of Personnel Action form was more specific: "Reason: Emotional Instability as evidenced by deep-seated feelings and resentments on subjects of sex discrimination, illegitimacy, and men in general. Inefficiency in handling tax cases as evidenced by technical and procedural errors, sub-standard report writing, and lack of proper audit techniques" (R. 89). It is obvious that the Notice of Removal explicitly informed petitioner that both charges, inefficiency and emotional instability, were found to be true and were relied upon, and more than this, the Notice specified the type of inefficiency and emotional instability which was found to exist. Nothing more was required.

Petitioner's final complaint is that witnesses were not presented for cross-examination at the hearing on her removal. The short answer is that the Lloyd-LaFollette Act expressly states: "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay."[11] Petitioner does not here argue or even suggest that this provision of the Act, which has been in effect since 1912, offends the Constitution.

[11] Thus, cases like *Williams* v. *Zuckert*, 371 U.S. 531, are completely inapplicable here, for they concerned removals under regulations which granted the right to examine witnesses. In the instant case, however, the statute expressly authorizes the refusal to permit the examination of witnesses, and petitioner has pointed to no regulation of the Internal Revenue Service which grants this right.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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